In The
Supreme Court Of The United States

78-1930

OCTOBER TERM, 1978

THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION,
PETITIONER

vs.

LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA,
RESPONDENT

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, respectfully moves this Court for leave to file the Petition for Writ of Certiorari hereto annexed under Section 1651 of Title 28 of the United States Code, directed to the United States Court of Appeals for the Second Circuit, and particularly the Honorable Henry J. Friendly, the Honorable J. Joseph Smith and the Honorable Walter R. Mansfield, Circuit Judges of the United States Court of Appeals for the Second Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit rendered in this cause on March 8, 1979.

I. Opinions Delivered in Courts Below

Copies of the orders of the United States Court of Appeals for the Second Circuit and the motions and opinions in connection therewith which may be essential to an understanding of the matters set forth in this Petition, are appended hereto and marked as Exhibits A, B, C, D, E, F, G, H, I, J, K and L.

II. Jurisdictional Statement

The date of the judgment sought to be reviewed is March 8, 1979, and the time of its entry is March 8, 1979. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1651(a) of Title 28 of the United States Code. The compelling circumstances which warrant immediate review by this Court of the order hereby involved are in this petition under "Reason Relied on for Allowance of Writ."

III. Questions Presented

The questions presented for review are:

(1) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in ruling that said Court lacked venue because the Petitioner's claim did not arise in the State of Connecticut, when the facts establish that: (1) the bid documents were received in Connecticut, (2) the bid was prepared in Connecticut, (3) the contract was signed in Connecticut, (4) all material and equipment were ordered from Connecticut, (5) the project manager was hired in Connecticut, (6) all employees were paid from Connecticut, (7) all corporate books and reports were kept in Connecticut and all of Petitioner's employees and executives who have knowledge of the subject matter of this litigation live and work in Connecticut?

(2) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE IN THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in ordering said action transferred pursuant to 28 U.S.C. §1406(a) to the United States District Court for the District of South Dakota by abusing its discretion in ordering said transfer when said transferor District Court had proper venue?

(3) Did the United States Court of Appeals for the Second Circuit in IN RE THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Civil Action File No. H-79-3013, err in denying the Petition for Writ of Mandamus and Motion for Stay?

IV. Statutes Involved

The statutes of the United States which are involved are 28 U.S.C. §1391(b) and (c), and 28 U.S.C. §1406(a).

28 U.S.C. §1391(b) provides as follows:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the Judicial District where all the Defendants reside, or in which the claim arose, except as otherwise provided by law." (emphasis added)

28 U.S.C. §1391(c) provides as follows:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

28 U.S.C. §1406(a) provides as follows:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

V. Statement of Case

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1331(a), as there are substantial federal questions involved in the underlying cause of action.

The Petitioner is a Connecticut corporation whose principal place of business is in Bloomfield, Connecticut. Petitioner was the successful bidder on a contract to build a utility line for the United States of America on federally-owned land in South Dakota and Iowa.

All of Petitioner's financial, fiscal and planning activities were conducted from Connecticut. When it formulated the bid for this contract, the bid was formulated in Connecticut. All payments

to subcontractors, suppliers and taxing authorities were made from Connecticut. All materials were ordered from Connecticut and paid for from Connecticut. Any profits the Petitioner makes and any losses it sustains, are profits made and losses sustained in Connecticut.

In the course of performing the contract, the Petitioner had occasion to use certain materials owned and supplied to it by the United States of America. The Petitioner also had occasion to order certain materials from outside the State of South Dakota which, on arrival in said State, but prior to passing into the possession of the Petitioner, were sold to the United States of America. Both kinds of material were later used by the Petitioner in its performance of its contract with the United States of America.

Lyle Wendell, Secretary of Revenue of the State of South Dakota, attempted to levy a use tax upon the Petitioner based upon the value of the materials used by the Petitioner but owned and supplied by the United States of America. A portion of said assessment was paid under protest by the Petitioner, from its home office in Connecticut. Subsequent to the protested payment, said Lyle Wendell informed the Petitioner that he intended to assess a further use tax.

The Petitioner brought an action in the District of Connecticut seeking an injunction against any further enforcement of the South Dakota use tax by said Lyle Wendell, and seeking a refund of the $67,389.93 in taxes paid under protest. Lyle Wendell filed a Motion to Dismiss

said action based upon challenges to personal jurisdiction and venue. The District Court, Clarie, J., sustained the challenge to venue and ordered the action transferred to the District of South Dakota. Said Court subsequently refused to amend its Order and refused to certify pursuant to 28 U.S.C. §1292(b) that the disputed issue of law was a matter affording serious grounds for a difference of opinion.

The Petitioner appealed to the United States Court of Appeals for the Second Circuit from both the Order to Transfer and the denial of the motion to amend the Order to incorporate the Section 1292(b) certification. Said appeal was dismissed for lack of jurisdiction.

The Petitioner sought a Writ of Mandamus and motion for a stay from the United States Court of Appeals for the Second Circuit to review the United States District Court for the District of Connecticut's determination that said Court lacked venue and for its transfer of said action to the United States District Court for the District of South Dakota. Said Petition for a Writ of Mandamus was denied on March 8, 1979.

VI. Reasons Relied on for Allowance of Writ

This is an appropriate case for this Court to exercise its power to issue all necessary writs under 28 U.S.C. §1651 for the following reasons:

A. VENUE WAS PROPERLY PLACED IN THE JUDICIAL DISTRICT OF CONNECTICUT BASED ON THE JUDICIAL DISTRICT IN WHICH THE CLAIM AROSE.

28 U.S.C. Section 1391(b) provides for venue in a Civil Action in the Judicial District ... "in which the claim arose."

Attached hereto as "Exhibit M" is a copy of the Affidavit of Mr. Eugene D. Bross, Executive Vice-President of the Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, dated February 9, 1978.

This Affidavit clearly points out that the Judicial District of Connecticut is the District wherein "the claim arose."

(1) The bid documents for the construction contract in question were received in Connecticut.

(2) The bid was fully prepared and fully estimated by the Petitioner's employees, solely in Connecticut.

(3) The actual construction contract, after receipt of the successful bid, was signed by the Petitioner, in Connecticut.

(4) All materials and all equipment needed for the construction contract were ordered solely from Connecticut.

(5) All materials that are the subject of the State of South Dakota's Use Tax Claim, were ordered solely from Connecticut (with the sole exception of the materials supplied by the United States Government).

(a) All orders for these materials were confirmed by purchase order issued from Connecticut.

(b) All directions for the initial delivery of these materials were issued from Connecticut.

(c) All invoices for payment of these materials were received solely from Connecticut.

(d) All payments for these materials were made solely from Connecticut.

(6) The project manager on the subject construction job was hired in Connecticut.

(7) All books and records concerning employees and actual labor performed on the construction job were maintained in Connecticut.

(8) All labor on the subject construction job was paid solely from Connecticut.

(9) All materials and equipment needed and utilized on the subject job were sent from Connecticut or ordered solely from Connecticut.

(10) All orders for the general supervision of the subject construction job were issued from Connecticut.

(11) All corporate books, records, and reports concerning the subject construction job were kept solely in Connecticut, and remain in Connecticut.

(12) All of the Petitioner's employees and executives who have knowledge of the subject matter of this litigation, live in Connecticut and work in Connecticut. The Petitioner has only two full-time employees in South Dakota.

(13) All of Petitioner's witnesses as to the facts of this case, and all books, records, reports, invoices, cancelled checks and other documents, are located solely in Connecticut.

(14) The payment of $67,389.93 made by the Petitioner to LYLE WENDELL, Secretary of Revenue of the State of South Dakota, under protest on account of the South Dakota Use Tax, was made from Connecticut.

(15) All materials and supplies for which the State of South Dakota is claiming Use Tax were ordered and purchased from, invoiced to and paid solely from Connecticut.

On the facts, it is clear that the claim which is the subject matter of this litigation, arose in the Judicial District of Connecticut.

The Situs of the taxing injury or the potential taxing injury does not,

however, in and of itself determine the proper venue of this case. In Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 291 F. Supp. 252, 260 (1968), the U.S. District Court held that to adopt a "mechanical test" of "place of injury" to determine "where the claim arose" may be valid in a tort suit involving personal injuries or wrongful death, but would be overly "simplistic" in other cases.

The case of Weil v. New York State Department of Transportation, 400 F. Supp. 1364 (1975) concerned an action brought by a state civil servant to contest a lay-off. The U.S. District Court, using the "weight of the contacts" test, held that venue should be placed in the district in which the decision to lay off the plaintiff was made, rather than in the district in which the decision was implemented.

The Petitioner's action presents an analogous situation. The facts clearly show that the weight of the contacts in the preparation, execution and performance of the BROSS-UNITED STATES contract have been almost exclusively in the District of Connecticut. All of the materials sought to be taxed by the Defendant were ordered, invoiced and paid for in Connecticut. Directions for shipment in interstate commerce were issued from Connecticut. Therefore, within the meaning of 28 U.S.C. 1391(b), venue is properly placed in the District of Connecticut where the contract and the claim arose.

B. VENUE WAS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT BASED ON CONSIDERATIONS OF INCONVENIENCE AND DISADVANTAGE TO A PARTY.

In the event that this Court should find that the balance of the weight of the contacts in this action is shared between the District of Connecticut and an alternative district, venue is properly placed in the District of Connecticut nonetheless.

In Idaho Potato Commission v. Washington Potato Commission, 410 F. Supp. 171 (1975), the defendant had approved an advertising plan in the State of Washington. The plan, which was the basis for an alleged trademark infringement, was implemented in Idaho. The court held that the "weight of the contacts" was shared between Washington and Idaho. Venue could be properly placed in either district. Selection of either forum would be equally disadvantageous and inconvenient to the parties involved. The court allowed the action to be brought in the forum chosen by the Plaintiff.

In the instant action, the Petitioner BROSS would be greatly inconvenienced and would suffer severe hardship if its action were to be transferred out of the District of Connecticut (or dismissed entirely). BROSS' witnesses, key personnel, and business books and records are all located within the District of Connecticut. If this Court were to find that the balance of "the weight of the contacts" is shared between the Connecticut district and an

alternate forum, Idaho Potato Commission still requires that the Plaintiff's choice of forum should be respected, and that venue be placed in the District of Connecticut.

C. VENUE WAS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT WHICH IS THE RESIDENCE OF THE CORPORATE PLAINTIFF.

28 U.S.C. 1391(c) provides an additional justification for the placement of venue in the Judicial District of Connecticut. That Statute provides:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

A number of Courts have held that Section 1391(c) was intended to apply to corporate plaintiffs as well as corporate defendants.

This view is in keeping with Congressional intent to liberalize the venue status.

See 1 Moore's Fed Practice ¶70.142 (5-3) at 1500-1503:

> "Toilet Goods Association, Inc. v. Celebrezze, 235 F. Supp. 648 (S.D.N.Y. 1964); Wear-Ever Aluminum, Inc. v. Sipos, 184 F. Supp. 364 (S.D.N.Y. 1960);

Southern Paperboard Corporation v. United States, 127 F. Supp. 649 (S.D.N.Y. 1955); Freiday v. Cowdin, 83 F. Supp. 516 (S.D.N.Y. 1949), appeal dismissed by consent, 177 F.2d 1020 (2d Cir. 1949); Consolidated Sun Ray, Inc. v. Steel Insurance Co., 190 F. Supp. 171 (E.D. Pa. 1961); Travelers Insurance Co. v. Williams, 164 F. Supp. 566 (W.D.N.C. 1958) aff'd 265 F.2d 531 (4th Cir. 1959); Standard Insurance Co. v. Isbell, 143 F. Supp. 910 (E.D. Tex. 1956); Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426 (E.D. Pa. 1956); Hadden v. Barrow, Wade, Guthrie & Co., 105 F. Supp. 530 (N.D. Ohio 1952)."

Furthermore, unless Section 1391(c) is interpreted to apply to both corporate plaintiffs and defendants, the second clause is redundant and would, therefore, be read so as to define the residences of corporate plaintiffs differently from the residences of corporate defendants. It is an accepted rule of statutory construction that statutes must be read so as to be logically and internally consistent. So read, §1391(c) provides BROSS as a corporate plaintiff and resident of the District of Connecticut, an additional basis to properly establish venue for this action in the District of Connecticut.

Equity, fairness and good sense require that venue in this action be and remain in Connecticut.

D. TRANSFER OF THE CAUSE OF ACTION TO SOUTH DAKOTA WAS IMPROPER AND AN ABUSE OF DISCRETION.

As previously noted, 28 U.S.C. §1406(a) provides as follows:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (emphasis added)

Said statute requires that the transferor District Court lack venue and that the transferee District Court have proper venue. As demonstrated above, said transferor District Court had proper venue over the underlying cause of action, and hence the Honorable T. Emmet Clarie misapplied said statute by ordering the transfer. The transfer denied the United States District Court for the District of Connecticut of jurisdiction, when said court had proper venue and jurisdiction.

E. A WRIT OF MANDAMUS IS THE APPROPRIATE PROCEDURE TO REVIEW AN INTERLOCUTORY ORDER DIRECTING A TRANSFER.

The United States Court of Appeals for the Second Circuit has stated that mandamus would lie to review an interlocutory order granting or denying a transfer. In Ford Motor Co. v. Ryan,

182 F.2d 329 (CA 2d, 1950), cert. den. 340 U.S. 851, Frank, Circuit Judge, Judge, held that mandamus would lie to review an order refusing to direct a transfer. The rationale for granting the writ of mandamus was stated as follows:

> "...Judge Hand and I think this is the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners--the defendants--finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this is a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."
>
> Ford Motor Company v. Ryan, 182 F.2d 329, at 330.

The above rationale for granting a writ of mandamus for a transfer pursuant to 28 U.S.C. §1404(a) is equally applicable to the instant matter, involving

a transfer pursuant to 28 U.S.C. §1406(a). "...(A)ny error in the interlocutory order would probably be incorrectable on appeal,..." whether the transfer was ordered pursuant to 28 U.S.C. §1404(a) or §1406(a).

VII. CONCLUSION

WHEREFORE, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

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